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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JESUS R. TALAMANTES, Defendant and Appellant.	2d Crim. No. B218887 (Super. Ct. No. KA084530) (Los Angeles County)

Jesus Romero Talamantes appeals from the judgment entered following his conviction by a jury of second degree robbery (count 1 - Pen. Code, §§ 211, 212.5, subd. (c)),[1] possession of ammunition by a convicted felon (count 3 - § 12316, subd. (b)(1)), and attempted murder (count 4 - §§ 664, 187, subd. (a)).[2] As to each of the robbery and attempted murder counts, the jury or trial court found true allegations that appellant had personally and intentionally discharged a firearm (§ 12022.53, subd. (c)) and had suffered two prior convictions of a serious felony. (§ 667, subd. (a)(1).) As to all counts, the trial court found true an allegation of two prior serious or violent felony convictions within the meaning of California's "Three Strikes" law. (§§ 1170.12, subds.(a)-(d); 667, subds. (b)-(i).) In addition, the trial court found true an allegation of one prior prison term. (§ 667.5, subd. (b).) Appellant was sentenced to prison for 115 years to life.

[1] All statutory references are to the Penal Code.

[2] The trial court granted respondent's pretrial motion to dismiss count 2.

The prosecution introduced DNA evidence. Appellant contends that he was denied his Sixth Amendment right to confront the analysts who had performed the DNA analysis. He also contends that (1) on each of the robbery and attempted murder counts, the trial court erroneously imposed two five-year enhancements pursuant to section 667, subdivision (a)(1); and (2) the evidence was insufficient to support the true finding on the prior prison term allegation pursuant to section 667.5, subdivision (b).

We accept respondent's concession that, on each of the robbery and attempted murder counts, the trial court should have imposed only one five-year enhancement pursuant to section 667, subdivision (a)(1). We modify the judgment accordingly and affirm the judgment as modified.

Facts

In December 2007 a male Hispanic robbed Kenneth Johnson. The robber fired a shotgun at Johnson but missed. A deputy sheriff showed Johnson a six-pack photographic lineup that included a photograph of appellant. Johnson was unable to identify the robber. But Johnson identified appellant at the preliminary hearing and at trial.

Immediately before committing the robbery, the robber removed a cigarette butt from his mouth and threw it on the floor. DNA from the cigarette butt matched DNA from appellant.

The DNA analysis was performed by Jody Hines and Casey DuPont, who were employed by Orchid Cellmark. They prepared a three-page document entitled, "Report of Laboratory Examination." Hines and DuPont did not testify at trial.

Rick Staub testified as an expert on the DNA evidence. He has a Ph.D. degree in genetics and is the Forensic Laboratory Director of Scientific Operations for Orchid Cellmark. Based on the report prepared by Hines and DuPont, Staub explained the DNA test results. Staub testified that Hines and DuPont had concluded "that, in the absence of an identical twin, the DNA profile obtained from the . . . cigarette butt is identified as originating from [appellant]." Staub opined "with confidence" that no error had occurred in Hines and DuPont's DNA analysis. He also opined that that "there was no empirical

evidence" that the DNA samples had been "compromised in any way." Hines and DuPont's report was received in evidence.

Sixth Amendment Confrontation Right

Appellant contends that he was denied his Sixth Amendment right to confront Hines and DuPont. His contention is based on *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. __ [129 S.Ct. 2527, 174 L.Ed.2d 314], which was decided after the jury had returned its guilty verdicts. In *Melendez-Diaz* the United States Supreme Court concluded that affidavits reporting the results of forensic analysis are testimonial evidence. The affiants, therefore, are " 'witnesses' subject to the defendant's right of confrontation under the Sixth Amendment." (*Id.,* 129 S.Ct. at p. 2530.) The Supreme Court reversed the defendant's conviction because the trial court had admitted analysts' affidavits showing that the substance seized from his person was cocaine. At trial the defendant had objected that the Confrontation Clause "required the analysts to testify in person." (*Id.*, 129 S.Ct. at p. 2531.) The Supreme Court reasoned: "Absent a showing that the analysts were unavailable to testify at trial *and* that [defendant] had a prior opportunity to cross-examine them, [defendant] was entitled to be ' "confronted with" ' the analysts at trial. [Citation.]" (*Id.,* 129 S.Ct. at p. 2532, fn. omitted.)

Melendez-Diaz is distinguishable. In *Melendez-Diaz* no expert testified concerning the analysis of the substance in question. Thus, the defendant "did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed." (*Melendez-Diaz v. Massachusetts, supra,* 129 S .Ct. at p. 2537.) Here, in contrast, the director of the analysts' laboratory - Rick Staub - testified concerning the DNA analysis, and he was extensively cross-examined by appellant's counsel.

The instant case is similar to *People v. Geier* (2007) 41 Cal.4th 555. In *Geier* Cellmark's laboratory director, then Dr. Robin Cotton, testified concerning a DNA analysis that had been performed by a Cellmark analyst. Dr. Cotton relied on the analyst's report. The defendant contended that, because the analyst had not testified, the admission of the analyst's report and DNA results violated his Sixth Amendment confrontation rights. Our

Supreme Court rejected the defendant's contention. It concluded that the report did not constitute an inadmissible testimonial statement. In reaching this conclusion, the court noted: "the accusatory opinions in this case - that defendant's DNA matched that taken from the victim's vagina and that such a result was very unlikely unless defendant was the donor - were reached and conveyed not through the nontestifying technician's laboratory notes and report, but by the testifying witness, Dr. Cotton." (***Id.***, at p. 607.)

Geier was not overruled by *Melendez-Diaz*.[3] Based on *Geier*, appellant's confrontation rights were not violated because Staub testified at trial about the DNA testing and opined "with confidence" that no error had occurred in Hines and DuPont's DNA analysis. Pursuant to the doctrine of stare decisis, we must follow *Geier*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) We therefore conclude that appellant was not deprived of his Sixth Amendment right to confront the witnesses against him.[4]

Sentencing

On each of the robbery and attempted murder counts, the trial court found true allegations that appellant had suffered two prior convictions of a serious felony - attempted murder - pursuant to section 667, subdivision (a)(1). For these prior convictions, the trial

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[3] Certiorari was denied in *Geier* four days after *Melendez-Diaz* was decided. (Cert. den. June 29, 2009, No. 07-7770, *sub nom. Geier v. California* (2009) __ U.S. __ [129 S.Ct. 2856, 174 L.Ed.2d 600]. "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case . . . ." (*United States* v. *Carver* (1923) 260 U.S. 482, 490 [43 S.Ct. 181, 67 L.Ed. 361].)

[4] Our Supreme Court has granted review in a number of cases "which present issues concerning the right of confrontation under the Sixth Amendment when the results of forensic tests performed by a criminalist who does not testify at trial are admitted into evidence and how the decision of the United States Supreme Court in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___, 129 S.Ct. 2527, 174 L.Ed.2d 314, affects [our Supreme Court's] decision in *People v. Geier* (2007) 41 Cal.4th 555." (Judicial Council of California News Release No. S.C. 11/10, dated March 19, 2010.) The cases in which review has been granted include *People v. Gutierrez* (2009) 177 Cal.App.4th 654, S176620; *People v. Lopez* (2009) 177 Cal.App.4th 202, S177046; *People v. Dungo* (2009) 176 Cal.App.4th 1388, S176886; and *People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047, S176213.

court imposed two five-year enhancements on each of the robbery and attempted murder counts. We accept respondent's concession that, as to each count, only one section 667, subdivision (a)(1), enhancement is applicable. The enhancement applies to "each . . . prior conviction on charges brought and tried separately." (§ 667, subd. (a)(1).) The record shows that both prior convictions were based on charges brought and tried together in the same action: case number KA003265. We therefore modify the judgment by striking one of the section 667, subdivision (a)(1), enhancements on each of the robbery and attempted murder counts.

Appellant contends that the evidence is insufficient to support the trial court's true finding on a prior prison term allegation within the meaning of section 667.5, subdivision (b). The issue is moot because the trial court struck the allegation pursuant to section 1385.

Disposition

On each of the second degree robbery (count 1) and attempted murder (count 4) convictions, the judgment is modified by striking one of the two five-year enhancements imposed pursuant to section 667, subdivision (a)(1). This modification reduces appellant's aggregate sentence from 115 years to life to 105 years to life. As modified, the judgment is affirmed. The trial court shall prepare an amended abstract of judgment and transmit a certified copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

YEGAN, Acting P.J.

We concur:

COFFEE, J.

PERREN, J.

George Genesta, Judge

Superior Court County of Los Angeles

Irma Castillo, under appointment by the Court of Appeal, for Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, Joseph P. Lee, Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.